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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1980

EDDIE HUTCHER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR CERTIORARI

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Questions Presented

1. Whether the failure of the Government to disclose to the defense prior testimony by a key Government witness which contradicted in every material respect his trial testimony, and which prior testimony was located in a file examined by Government agents just prior to trial, violated *Brady* v. *Maryland*, 373 U.S. 83 (1963)?

2. Whether the failure of the Government to disclose to the defense prior testimony by a key Government witness which contradicted in every material respect his trial testimony, and which prior testimony was located in a file examined by Government agents just prior to trial, violated the Jencks Act, 18 U.S.C. §3500?

3. Whether a general objection to the Government's cross-examination of a key defense witness about whether he had previously been questioned by a Grand Jury concerning several unrelated alleged bribes was sufficient under Federal Rules of Evidence, Rule 103(a), to preserve for appellate review the propriety of the Government's questioning?

Parties

In the United States Court of Appeals for the Second Circuit, the parties were: Eddie Hutcher and Stephen Mydanick, appellants, and United States of America, appellee. Mr. Mydanick and Mr. Hutcher were jointly indicted, but were tried at separate trials. Since this petition relates to events at Mr. Hutcher's trial, Mr. Mydanick is not interested in the petition. A notice to the Clerk, pursuant to Rules of the Supreme Court of the United States, Rule 19.6 is being filed together with the petition.

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PETITION FOR CERTIORARI

The petitioner, Eddie Hutcher, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (Lumbard, Mulligan & Oakes, C.JJ.) is not yet reported. It is reproduced at Appendix A, *infra,* at pp. 1a-13a. The decision denying rehearing and rehearing *en banc* is not yet reported. The orders are reproduced at Appendix D, *infra,* at pp. 46a-47a.

Jurisdiction

The judgment of the Court of Appeals was entered on May 5, 1980. See Appendix C, *infra,* at pp. 44a-45a. The orders denying rehearing and rehearing *en banc* were entered on June 18, 1980. Appendix D, *infra,* at pp. 46a-47a. The certiorari jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes and Rules Involved

The Fifth Amendment to the United States Constitution.

Title 18 United States Code Section 3500.

Federal Rules of Evidence, Rule 103(a).

The pertinent text of those provisions is set forth in Appendix E, *infra,* at pp. 48a-49a.

Statement of the Case

Petitioner was convicted of bribing an official of the Small Business Administration ("SBA"); false filing of an SBA loan application on behalf of a borrowing corporation; and conspiracy with respect to the substantive counts. [18 U.S.C. §§ 201(b), 371, 1001, 1002].

The evidence at trial presented a question solely of credibility:

The bribery allegation was supported by testimony of two alleged co-conspirators, both convicted felons. The

bribe was denied by petitioner, who testified in his own behalf, and by the alleged bribe receiver, one Kenneth Senhouse, who is still an employee of the SBA.

The false filing allegations were supported by the testimony of the co-conspirators, as well as the testimony of one Eugene Greenspun, who was presented to the jury as a disinterested witness. Mr. Greenspun had been president of the borrowing corporation and testified that, in his opinion, the machinery and equipment of the corporation was grossly overvalued on the financial statement submitted to the SBA in connection with the loan application.

Subsequent to the trial, the petitioner moved, pursuant to Federal Rules of Criminal Procedure, Rule 33, to set aside the verdict on two grounds:

1. That the prosecution had been improperly permitted, over objection, to cross-examine Mr. Senhouse (the alleged bribe receiver) with respect to prior sworn *denials* in Grand Jury testimony of allegations that he had received bribes from six individuals wholly unrelated to the case at bar. See Appendix F, *infra,* at pp. 50a-54a. Neither Mr. Senhouse nor anyone else has ever been indicted with respect to these unrelated bribes.

2. That the prosecution had failed to produce documents required by *Brady* v. *Maryland,* 373 U.S. 83 (1963) and by the Jencks Act (18 U.S.C. §3500). The material which was not produced (and which was discovered by the defense after the trial) consisted of five separate sworn statements by the witness Greenspun attesting to the accuracy of the valuations for machinery and equipment set forth in the SBA loan application, and thus, directly contra-

dicting his new trial testimony. These prior sworn statements were contained in bankruptcy court records examined by two investigators in the prosecutor's office within one month prior to the trial.

In a 30-page decision, the District Court denied both branches of petitioner's motion to set aside the jury verdict. Appendix B, *infra,* at pp. 14a-43a.

The Court of Appeals affirmed petitioner's conviction and seven-year sentence. With respect to the challenged cross-examination of Mr. Senhouse, the Court of Appeals never reached the merits of whether it was proper. Rather, the Court of Appeals held that defense counsel's objection to this cross-examination was not sufficiently specific to preserve the issue for review. In reaching this conclusion, the Court of Appeals specifically held that ". . . the specific grounds of the objection [were not] apparent from the context" (7a), and, therefore, under Federal Rules of Evidence, Rule 103(a), the objection was insufficient. The Court of Appeals also held that the admission of the Senhouse cross-examination was not "plain error". Fed. R. Crim. P. 52(b).

The Court of Appeals also concluded that *Brady* v. *Maryland, supra,* and the Jencks Act were not violated, stating that "the simple and sufficient answer to Hutcher's claim is that Greenspun's affidavit and testimony were never in the possession of the prosecution—" (9a).

Reasons for Granting the Writ

I

The Court of Appeals' decision that the prosecution did not "possess" the exculpatory evidence, which is also Jencks Act material, is in conflict with decisions in other circuits and the petitioner's right to due process.

The United States Court of Appeals for the Second Circuit held that pre-trial sworn testimony by the key government witness, which belied his trial testimony and which supported the defense theory of the case, was not "Brady" material [*Brady* v. *Maryland*, 373 U.S. 83 (1963)], nor "3500" material (18 U.S.C. §3500). The Court of Appeals did not dispute that this material was crucial to the defense, or that it directly contradicted the prosecution witness. Rather, the Court of Appeals held that the material was not producible because "the prosecution never had possession" of the transcripts and exhibits in the bankruptcy court file containing the witness' sworn statements (9a-10a).

The accuracy of the Second Circuit's observation that "the prosecutor never had possession" of the material depends upon the operative definitions of the words "possession" and "prosecution."

With respect to "possession," the Second Circuit must have equated the word "possession" as used in the Jencks Act with the legal concept of "custody." While the documents were never physically in the custody of the prosecutor, it was undisputed that prior to trial the bankruptcy court file had been examined twice, once by an investigator

in the United States Attorney's office and once by an accountant-FBI agent. During these examinations, both agents took notes indicating that they had examined the entire file. The accountant testified at the post-trial Rule 33 hearing that he "presume[s]" he saw the testimony and affidavits which contradicted Greenspun's trial testimony.

Thus, it is undisputed that an FBI agent and an investigator in the prosecutor's office each had the material in question *in his hands* prior to trial. The question presented to this Court, and answered in the negative by the Second Circuit is whether having the documents in one's hands, however temporarily, constitutes "possession" for the purpose of §3500. Put another way, can the prosecution avoid the dictates of *Brady* and §3500 by refusing to take custody of documents which come into its hands? "Restricting possession to physical control at the time of trial would 'permit evasion and emasculation of the Jencks Act to the point of total ineffectiveness.' *United States* v. *Lonardo*, 350 F. 2d 523, 530 (CA 6, 1965)". *Augenblick* v. *United States*, 377 F. 2d 586, 598 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969).

This case therefore differs from the decisions, apparently relied upon by the Court of Appeals (10a), that do not require the Government to disclose information contained in a probation department report which the agents did not see, read or have in their lawful custody at any time. See *e.g.*, *United States* v. *Canniff*, 521 F. 2d 565, 573 (2d Cir. 1975), *cert denied, sub nom. Benigno* v. *United States*, 423 U.S. 1059 (1975); *United States* v. *Dansker*, 537 F. 2d 40, 51 (3rd Cir. 1976), *cert. denied* 429 U.S. 1038 (1977); *United*

States v. *Trevino*, 556 F. 2d 1265, 1270-1 (5th Cir. 1977). If the Government is "not aware of the existence of" documents, they are not "3500" material. *United States* v. *Goldberg*, 582 F. 2d 483, 486 (9th Cir. 1978), *cert. denied*, 440 U.S. 973 (1978). Here the Government knew of the documents.

The Second Circuit also held that the "prosecution" never had possession of the documents in the bankruptcy court file because the Assistant United States Attorney who tried the case was not among the Government agents who inspected the bankruptcy court file. In effect, the Second Circuit has provided a loophole for prosecutions by which—as occurred at bar—a trial prosecutor can avoid *Brady* and §3500 by instructing a trained investigator and an FBI agent-accountant to inspect documents and leave, where they are, the ones which are not "helpful" to the Government's case. Apparently, according to the Second Circuit, the "Government" includes only the trial prosecutor but none of his investigators.

The Second Circuit's effort to separate the trial prosecutor from his investigative agents with respect to the Government's constitutional obligation to disclose exculpatory evidence and the Government's statutory obligation to disclose prior statements of its witnesses, is erroneous. It is also inconsistent with the rules in Fourth, Fifth, Ninth and District of Columbia Circuits. *Barbee* v. *Warden*, 331 F. 2d 842, 846 (4th Cir. 1964); *Boone* v. *Paderick*, 541 F. 2d 447, 451 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); *United States* v. *Haldeman*, 559 F. 2d 31, 73-5 (4th Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *United States* v. *Beasley*, 576 F. 2d 626, 631-2 (5th Cir. 1978), *cert. denied*, 440 U.S. 947

(1978); *United States* v. *Carrasco*, 537 F. 2d 372, 375-7 (9th Cir. 1976); *United States* v. *Bryant*, 439 F. 2d 642, 650 (D.C. Cir. 1971).

Those circuits' decisions are consistent with this Court's holding in *Brady* v. *Maryland, supra*, and its progeny [*e.g.*, *United States* v. *Agurs*, 427 U.S. 97 (1976); *Giglio* v. *United States*, 405 U.S. 150 (1972)]. "[T]he duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies." *United States* v. *Bryant, supra*, at 650. As the Fourth Circuit so aptly put it, "the police are also part of the prosecution." *Barbee* v. *Warden, supra*, at 846. "The prosecutor's office is an entity." *Giglio* v. *United States, supra* at 154; *Santobello* v. *New York*, 404 U.S. 257, 262 (1971).

II

The Court of Appeals' conclusion that the trial objection was not specific enough to preserve for review the errors in questioning the key defense witness, misconstrues the requirements of Federal Rule of Evidence 103(a).

The key defense witness at trial was Kenneth Senhouse; the Government conceded that "if his [Senhouse's] testimony was believed, the jury would necessarily have been required to acquit Hutcher on the charge of bribing Senhouse" (Brief for United States, p. 24). The Court of Appeals for the Second Circuit failed to provide any appellate review of the substantive evidentiary ruling of the District Court with respect to seven pages of cross-examination of Mr. Senhouse with respect to whether he had been questioned by the FBI and Grand Jury about unrelated allega-

tions of bribery for which he was never indicted. The Court of Appeals declined to review the merits of petitioner's claim because petitioner had not specified the grounds of his objection to this line of questions and because it concluded that the grounds for the objection were not "apparent from the context," within the meaning of Rule 103(a) of the Federal Rules of Evidence.

The ground of petitioner's objection to the challenged line of questioning relating to prior testimony before a Grand Jury about prior alleged acts of misconduct where no indictment resulted, is blatantly obvious. See 50a-54a.

If the overly restrictive ruling by the Second Circuit is allowed to stand, it would be difficult to imagine *any* non-specific objection which would be preserved for appeal as "apparent from the context."

Rule 103(a) is a "remarkable cryptic statement of the requirement of specificity" of objections. 21 Wright & Graham, Federal Practice and Procedure: Evidence §5036, page 178. The interpretation of that requirement is "an important question of federal law which has not been, which should be, settled by this Court." Rules of the Supreme Court of the United States, Rule 17.1(c). It has long been held that articulated specificity is unnecessary where the parties and the trial court understand the issue. *Cf. On Lee* v. *United States,* 343 U.S. 747, 749 n. 3 (1952); *cf.* Schwartz, Proposed Rules of Evidence, An Introduction and Critique, 38 U. Cinc. L. Rev. 449, 454 (1969). While it is clear that specificity is of value, and indeed necessary, where the hearing on the objection might develop relevant facts [*United States* v. *Indiviglio,* 352 F. 2d 276, 279 (2d Cir. 1965), *cert. denied,* 383 U.S. 907 (1966); *On Lee* v. *United*

States, supra] or a factual basis might lay a foundation [*United States* v. *Maultasch*, 596 F. 2d 19, 24 (2d Cir. 1979); *United States* v. *Mangan*, 575 F. 2d 32, 44 (2d Cir. 1978), *cert. denied*, 439 U.S. 931 (1978)] no such purposes would be served here; for the obvious basis for the objection is "apparent."

The Second Circuit's extremely restrictive reading of Rule 103(a) appears to be contrary to the ruling of the Seventh Circuit in *United States* v. *McPartlin*, 595 F. 2d 1321, 1353 (7th Cir. 1979), *cert. denied*, 444 U.S. 843 (1979), where the basis of the objection could not be ascertained from any facts of the case, but required a knowledge of newspaper disclosures in the State of Illinois. The Court should grant plenary review to resolve the conflict and to clarify one of the most important of the Federal Rules of Evidence.

Conclusion

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 910, 919—September Term, 1979.

(Argued March 20, 1980 Decided May 5, 1980.)

Docket Nos. 79-1277, 79-1426

UNITED STATES OF AMERICA,

Appellee,

—against—

EDDIE HUTCHER and STEPHEN MYDANICK,

Defendants-Appellants.

Before:

LUMBARD, MULLIGAN and OAKES,

Circuit Judges.

LUMBARD, *Circuit Judge*:

Eddie Hutcher and Stephen Mydanick appeal from judgments of conviction for conspiring to defraud the United States in violation of 18 U.S.C. § 371, for making false statements to the Small Business Administration (SBA) in violation of 18 U.S.C. § 201(b), and, as to Hutcher only, for bribing an SBA loan officer in violation of

18 U.S.C. § 201(b). The judgments were entered in the Southern District of New York by Judge Brieant on November 9, 1979 and July 24, 1979, respectively, following separate jury trials. Hutcher claims that the prosecution improperly cross-examined a defense witness, improperly referred to that cross-examination in its rebuttal summation, and failed to fulfill its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. § 3500. Mydanick claims that the district court erred in charging the jury and in relying upon materially incorrect information in sentencing. We affirm both judgments.

I.

Neither Hutcher nor Mydanick questions the sufficiency of the evidence supporting his conviction. We therefore rehearse that evidence synoptically.

Hutcher was a principal of Astor Metal Products, a Brooklyn-based company which in 1973 was seeking an SBA-guaranteed loan.[1] Mydanick, his law partner Frank Crisona, John Ebbecke, an acquaintance of Mydanick and a former banker, and David Koch, a lawyer with some influence at the Vanguard National Bank on Long Island, all agreed to assure to Astor Metal—through fraud and bribery—a bank loan, an SBA loan-guarantee, and necessary interim loans. In return, Hutcher agreed to pay them a fee of $35,000, which equalled 10% of the amount of Astor Metal's loan. Thereafter, Hutcher, Mydanick, Crisona, and Ebbecke, in preparing Astor Metal's loan-

1. The SBA administers a guaranteed-loan program through which it guarantees the repayment of 90% of an amount borrowed by a small business from a commercial bank participating in the program.

guarantee application, inflated the company's financial statements, reported only $2,800 of the $35,000 "finder's fee" to be paid,[2] failed to report, of course, the intended bribes, and falsely reported Astor Metal's intended use of the loan. Mydanick signed the application as the attorney of record, and Ebbecke submitted it to the SBA.

To the finders' chagrin, the SBA rejected Astor Metal's application. They recommended to Hutcher that he personally talk to the SBA loan-officer in charge of applications from Long Island banks, Kenneth Senhouse. Hutcher did, and offered Senhouse $10,000 to approve Astor Metal's application, which was then re-submitted. Senhouse approved it. At a lunch attended by Hutcher, Senhouse, and Crisona, Hutcher paid Senhouse $5,000 and promised to pay the rest of the bribe upon the loan's closing.

Astor Metal received the $350,000 loan in March 1974. It used the money to satisfy its debt upon another loan—not, as stated in the loan-guarantee application, to acquire and repair machinery—and it never repaid Vanguard National Bank, which then demanded and received payment from the SBA. Astor Metal entered bankruptcy proceedings in 1976. Because all of Astor Metal's assets were covered by pre-existing liens when it liquidated in 1978, the SBA never recovered any of the $337,628 it paid to Vanguard pursuant to the guarantee. Moreover, Mydanick, Crisona, Ebbecke, and Koch never received their $35,000

2. The payment of a finder's fee is not illegal. However, the SBA requires that loan-guarantee applicants disclose such fees, and it rejects applications of businesses which have agreed to pay what it deems to be an exorbitant fee.

fee, for Hutcher, stating that they had not earned it, refused to pay them.

In 1978, Crisona agreed to cooperate with the government in prosecuting this fraud and bribery. Crisona tape-recorded conversations with Mydanick and Hutcher during which each admitted his role in the conspiracy. Crisona also, along with Ebbecke, testified for the prosecution at Hutcher's and Mydanick's trials.

Hutcher claims that the prosecution acted improperly in cross-examining a witness and in failing to make available certain evidence. Mydanick claims that the district court erred in charging the jury and in sentencing. We will recite seriatim the facts material to our discussion of each claim.

A.

Hutcher's first claim is that the prosecution improperly cross-examined Senhouse—by asking him whether, in connection with investigations unrelated to Hutcher's trial, he had been questoned by the FBI or before a federal grand jury about his alleged receipt of bribes—and that the prosecution improperly referred to that cross-examination in its rebuttal summation.

Prior to the prosecution's cross-examination of Senhouse, the defense pointed out in its opening statement to the jury that Senhouse still worked at the SBA and had never been indicted despite the prosecution's assertion that he accepted Hutcher's bribe. Also, in its direct examination of Senhouse, the defense elicited that neither the FBI nor the United States Attorney's Office had ever asked Senhouse whether he received a bribe from Hutcher, and that

Senhouse had not been asked to testify before the grand jury investigating the allegations against Hutcher. During cross-examination, the following occurred:

> "Q: Have you been interviewed by the FBI in connection with other allegations about the receipt of bribes?
>
> A: Yes, sir.
>
> Mr. Hollman: I will object to that.
>
> The Court: Overruled.
>
> A: Yes, sir."

The prosecution then elicited, without any further defense objection, that before the Hutcher investigation Senhouse had denied five allegations, put to him either by the FBI or before a federal grand jury, that he had received bribes in return for approving loan guarantee applications.

The defense elicited from Senhouse on redirect examination that Senhouse, after his last appearance before the grand jury in March 1976, had always been available to answer questions, but had never been asked whether he knew Crisona. Also, in its summation, the defense suggested that Hutcher had been indicted because the prosecution's "faulty investigation" had failed to discover that Senhouse would deny knowing Crisona and would deny receiving Hutcher's bribe. During rebuttal summation, to none of which the defense objected, the prosecution conceded that Senhouse should perhaps have been questioned, but then rhetorically asked, "[W]hat does that have to do with the guilt or innocence of Eddie Hutcher? What difference would it have made to the FBI or the grand jury if Mr. Senhouse had gone in and given another set of

denials?" The prosecution also asked the jury to consider whether, after viewing Senhouse and hearing his testimony, they would be deflected from an investigation by his denials.

Hutcher's claim that the prosecution's cross-examination and rebuttal summation were improper cannot avail him on appeal, for the single, general objection made at trial did not preserve this claim for appeal under Fed. R. Evid. (103(a)) and the admission of the prosecution's questioning and statements in summation did not constitute plain error of which we may take notice, even absent objection, under Fed. R. Evid. 103(d) and Fed. R. Crim. P. 52(b). Rule 103(a) states, "Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. . . ." This circuit ordinarily applies Rules 103(a) strictly, *United States* v. *Rubin,* 609 F.2d 51, 62-63 (2d Cir. 1979); *United States* v. *Maultasch,* 596 F.2d 19, 24 (2d Cir. 1979) (the claim of error was "unavailing" because defense "made no objection that clearly stated the specific ground now asserted on appeal"). Indeed, well before Rule 103(a) existed, this circuit followed the principle that Rule 103(a) incorporates: " *a general objection, if overruled,* cannot avail the objector on appeal." 1 *Wigmore on Evidence* § 18, at 332 (emphasis original); *see, e.g., United States* v. *Del Llano,* 354 F.2d 844, 847 (2d Cir. 1965) (en banc); *United States* v. *Indiviglio,* 352 F.2d 276, 279 (2d Cir. 1965) (en banc), *cert. denied,* 383 U.S. 907 (1966).

Hutcher's only objection—"I will object to that"—obviouly did not state a specific ground. Nor was the specific ground of objection "apparent from the context," for nothing in the record suggests that the trial judge or prosecution were already aware of the specific ground, Wright & Graham, *Federal Practice and Procedure: Evidence* § 5036, at 177-78; *cf. United States* v. *Check*, 582 F.2d 668, 675-76 (2d Cir. 1978); *United States* v. *Camporeale*, 515 F.2d 184 (2d Cir. 1975), that the defense failed to object specifically because the trial judge silently understood the ground, Wright & Graham, *supra*, at 182; *cf. United States* v. *McPartlin*, 595 F.2d 1321, 1353 (7th Cir.) *cert. denied*, —— U.S. —— (1979), or that the specific ground of objection was for any other reason apparent from the context.

Hutcher asserts that the first objection must be deemed sufficient because any objection after the first would only have attracted the jury's attention to the purportedly improper evidence. However, that possibility does not suffice to excuse noncompliance with Rule 103(a). Motions to strike and limiting instructions exist to curb the jury's attention to improper evidence. Not having objected after the prosecution's first cross-examination question nor having requested a motion to strike or a limiting instruction afterward, and not having objected at all to the rebuttal summation, Hutcher has not complied with Rule 103(a) or come within its exception as to either claimed impropriety.

The insufficiency of Hutcher's objection notwithstanding, we would take notice of the prosecution's purported improprieties if their admission constituted plain error. Fed. R. Evid. 103(d); Fed. R. Crim. P. 52(b); *United States* v.

Rubin, supra, 609 F.2d at 6. We do not believe, however, that plain error was committed. In its opening and direct examination of Senhouse, the defense questioned the thoroughness of the prosecution's investigation; and the defense re-invoked that challenge in its redirect examination of Senhouse and its summation. The trial judge did not plainly err in allowing the prosecution to respond to this clear attack upon its investigation. The prosecution's questioning and summation statements did not "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States* v. *Indiviglio, supra,* 352 F.2d at 280; nor has the adversary method of trial, whereby an attorney's conduct binds his client, produced in this case an unduly harsh result. *United States* v. *Moore,* 571 F.2d 76, 88 (2d Cir. 1978). Indeed, even if the admission of these statements could be considered plain error, the error almost certainly was harmless in light of the overwhelming evidence against Hutcher, which included his tape-recorded admissions and the testimony of two of his co-conspirators.

B.

Hutcher's second claim is that the prosecution failed to fulfill its obligation under *Brady* v. *Maryland,* 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. § 3500, because it failed to make available to the defense the affidavits and testimony which were given in Astor Metal's 1976 bankruptcy proceedings by one of the prosecution's witnesses, Eugene Greenspun, and which were inconsistent with Greenspun's testimony at Hutcher's trial. This claim does not warrant reversal either.

Greenspun became Astor Metal's production manager in 1974. When Astor Metal entered bankruptcy proceedings in 1976—proceedings which Hutcher, as a principal of Astor Metal, unquestionably knew about and most of which he probably attended—Greenspun submitted affidavits and testified as to the value of Astor Metal's assets. In preparing for Hutcher's trial, but before locating Greenspun or deciding whether to call him as a witness if he were found, the prosecution sent a non-lawyer investigator to inspect the bankruptcy court files for the purpose of looking for Greenspun's address, and it later sent a second non-lawyer investigator to inspect the file for testimony by Hutcher. Neither investigator brought Greenspun's affidavits or testimony to the prosecution; one investigator provided the prosecution with a copy of the bankruptcy proceedings docket sheet, which the prosecution made available to the defense. At Hutcher's trial, Greenspun again testified as to the value of Astor Metal's assets, and additionally as to the use to which Astor Metal put the loan proceeds, but Greenspun placed a significantly lower value upon the assets than he had in the bankruptcy proceedings.[3] Hutcher now claims that the prosecution had a duty under *Brady* and § 3500 to have made available to the defense Greenspun's affidavits and testimony.

The simple and sufficient answer to Hutcher's claim is that Greenspun's affidavits and testimony were never in the possession of the prosecution and were therefore not

3. In a post-trial evidentiary hearing upon Hutcher's motion for a new trial, the district court found that Greenspun's bankruptcy proceeding testimony was "false and probably perjurious."

materials which the prosecution had a *Brady* or § 3500 duty to make available. The prosecution never saw Greenspun's affidavits or testimony, which were in the possession of an arm of the district court and accordingly were not subject to the prosecution's control. "Clearly the government cannot be required to produce that which it does not control and never possessed or inspected." *United States* v. *Caniff*, 521 F.2d 565, 573 (2d Cir.), *cert. denied*, 423 U.S. 1059 (1975). Hutcher argues that the prosecution did possess these materials because they must for some time have actually been in the hands of the prosecution's investigators. We reject, however, a notion of "possession" which is so elastic as to embrace materials that the prosecution never had in its files, never inspected, and never knew about. The prosecution possessed only the bankruptcy proceeding's docket sheet, which it made available to the defense and which in any event provided Hutcher with the means of inquiring whether Greenspun had given any inconsistent testimony at the bankruptcy proceeding.

C.

Mydanick's first claim is that the district court relied, in sentencing him, upon a pre-sentencing report that was erroneous in two respects and upon a letter from the prosecution which he had no opportunity to rebut before sentencing. This claim borders on the frivolous.

In sentencing Mydanick to a five-year term of imprisonment, the district court stated its belief that Mydanick had an "evil and depraved attitude" toward a crime that it

considered to be "a very serious fraud."[4] The pre-sentencing report had advised the district court that a sentence of imprisonment of between 24 and 60 months would result in Mydanick's release on parole within the period recommended by the Parole Commission. It had also stated that Mydanick's offense, because "consummated," was rated "high" under 28 C.F.R. § 2.20 (1979). The prosecution's letter had submitted to the district court an unredacted transcript of a recorded conversation between Mydanick and Crisona. In connection with *pre*-trial motions, the prosecution had previously submitted to the district court the same unredacted transcript. Mydanick claims that the report should have advised that he be sentenced to a period of between 21 and 60 months, in order that he gain parole within the recommended period, that his offense should have been rated "moderate" because the conspiracy in which he joined was "unconsummated," and that he had no opportunity to comment upon the unredacted transcript because he did not know of the prosecution's letter until after the sentencing.

So long as a sentence is within statutory limits—as is Mydanick's—appellate review is at an end, unless the district court relied on constitutionally impermissible factors or materially incorrect information. *Dorszyski* v. *United States,* 418 U.S. 424, 431 & n.7 (1974); *United States* v. *Ochs,* 595 F.2d 1247, 1262 (2d Cir.), *cert. denied,* —— U.S. —— (1979). In light of the district court's evaluation of Mydanick and his offense, and the fact that the

4. We do not address Mydanick's other challenge to the sentencing procedure—that the district court unduly penalized Mydanick because he is a lawyer.

district court imposed the maximum sentence recommended in the pre-sentence report, it is clear that the report's statement as to the minimum period of sentencing was immaterial. It is equally clear that Mydanick's offense was correctly classified as "high," for the conspiracy in which Mydanick participated—to defraud the United States and make false statements to the SBA—was consummated. As to the unredacted transcripts, Mydanick cannot now claim that he had no opportunity to comment upon them, for he must have known that the district court had had the unredacted transcripts since before the trial began. If, in fact, Mydanick was surprised to learn at sentencing that the district court had taken into account the unredacted transcripts, and if Mydanick had some argument why the district court should not have taken those transcripts into account, then Mydanick could have filed a motion under Fed. R. Crim. P. 35. He did not do so.

D.

Mydanick's second claim is that the district court erred in two respects in charging the jury. We disagree.

Mydanick asked the disrict court to charge the jury that, in order to find him guilty of the conspiracy count, it must find that he knew of the false statements in the loan-guarantee application before the loan closed in March 1974, and also that, in order to find him guilty of either count, it must find that the finders' fee was to be paid out of the loan proceeds. The district court stated that its charge would implicitly include Mydanick's first request, and it denied his second request. Mydanick now argues

that the district court did not include his first request because the district court stated to the jury that the conspiracy alleged in the indictment continued until December 1974. Mydanick also argues that the district court erred in denying his second request.

The district court's charge did implicitly include Mydanick's first request. The jury was specifically instructed that the indictment alleged that Mydanick and his coconspirators had agreed to make false statements on the loan-guarantee application and that Mydanick denied having any knowledge before the loan was closed that the application contained false statements. By finding Mydanick guilty, the jury must have found that Mydanick knew that the application which he submitted contained false statements.

The district court properly denied Mydanick's second request. The jury did not need to find that the finders' fee was to be paid out of the loan proceeds, for that was not an essential element of the conspiracy of defrauding the United States and making false statements to the SBA. *See United States* v. *Rodriguez*, 545 F.2d 829, 831 (2d Cir. 1976), *cert. denied*, 434 U.S. 819 (1977).

Affirmed.

APPENDIX B

Memorandum of the District Court Denying Motion for a New Trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

October 25, 1979:

This Court: Memorandum and Order dated October 23, 1979 is withdrawn and the following version is substituted therefor.

CHARLES L. BRIEANT
U. S. D. J.

S 79 Cr. 169-CLB

UNITED STATES OF AMERICA,

Plaintiff,

v

EDDIE HUTCHER,

Defendant.

Brieant, J.

As a result of jury verdict, defendant stands convicted of three counts of felony; (1) conspiracy to defraud the United States in its administration of the Small Business Act by the Small Business Administration ("SBA") concerning a loan to Astor Metal Products Corp. (hereinafter

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"Astor" or "Astor Metals"); (2) making false statements on an SBA application for a loan to Astor; and (3) bribery of one Kenneth Senhouse, then and at the time of trial a Loan Officer of the SBA who passed the loan application of Astor Metals. Co-defendant Koch pleaded guilty to a superseding Information charging a misdemeanor arising out of the same events. As a result of a severance, co-defendant Mydanick was tried first on counts 1 and 2 and convicted.

Hutcher now moves for a new trial on the separate grounds discussed below, or alternatively for a judgment of acquittal. A post-conviction evidentiary hearing has been had and proof has been taken with respect to the issue raised.

Senhouse's Cross-examination by the Government

That branch of the motion founded upon what is now claimed to have been improper cross-examination of the defense witness, Kenneth Senhouse with respect to prior criminal acts presents the most serious attack on this conviction, and will be considered first.[1]

It was the theory of the superseding indictment filed March 21, 1979 in this case, that Hutcher and others had conspired in 1973-74 to pay a bribe to Senhouse in his capacity as a Loan Officer of SBA, and that Hutcher had done so. The Government's proof depended primarily on the

1. While the Government notes, correctly, that the motion for a new trial on this ground was untimely under Rule 33, F.R.Crim.P., because not filed within seven days after the guilty verdicts, the Court believes that in the interest of Justice, the motion should be considered on the merits.

testimony of unindicted co-conspirators Crisona and Ebbecke. Prior to the indictment, and some four years after the event, Crisona had arranged a meeting with Hutcher at which Crisona was wired for sound. During this meeting, which took place in a restaurant, defendant and the Government's cooperating individual Crisona reminisced about the good old days, exhanging confidences, and discussed their mutual participation in the crimes charged here. The name of Senhouse was disclosed during pre-trial proceedings and the tapes were available to defendant and his trial counsel long prior to trial. On the tapes defendant Hutcher discusses Senhouse in terms following:

> "Crisona: And you [Hutcher] gave him [Senhouse] a pile of dough, you bastard.
>
> Hutcher: I gave him what he was entitled to.
>
> Crisona: Right, right. They used to get, you know. I used to feed them peanuts, and ahhh, you start talkin' big dough with him, and ahhh he became your friend and not mine.
>
> Hutcher: Closed four deals for me.
>
> Crisona: He [Senhouse] closed four deals for you!
>
> Hutcher: Never got paid back, I understand, a nickel.
>
> Crisona: I'll be damed. I I know (ui) . . .
>
> Hutcher: I mean the government (ui) . . .
>
> * * *
>
> Hutcher: (UI) I'll get Kenny [Senhouse]. I have no problems with Kenny.
>
> Crisona: We Just, we just, what?
>
> Hutcher: I have no problems with Kenny.
>
> Crisona: No, you pay cash.
>
> * * *

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Crisona: You know that those fellers, once you pay them.

Hutcher: I took very good care of him [Senhouse].

Crisona: You did. I know on that deal, 'cause you weren't, you were charging us back, but fuck ya, I never made a penny on that whole deal [Astor Metals loan].

Hutcher: You weren't entitled to it.

* * *

Hutcher: You guys had the deal, oh seven months, and so day I got disgusted and I went down to the SBA myself . . .

Crisona: And youse met Kenny [Senhouse].

And I met Kenny. Kenny said to me, 'come here baby, let me show you how to do this (ui).' "

Later, on tape, Hutcher told Crisona that Senhouse had procured a Government paper clip manufacturing contract for Astor Metals and "did not receive a nickel for it." Hutcher offered to telephone "Kenny" in Crisona's behalf with respect to a future deal to be conducted, and said, with reference to bribe payments to Senhouse, that "I get away with 3 Grand now."

Confronted with his own words on tape to the above effect, it was difficult for defendant to formulate a theory of defense. In addition to Crisona's tape of Hutcher admitting the bribes to Senhouse quoted above, defendant anticipated correctly that Crisona would testify that he was present in a restaurant and witnessed a transaction in which Hutcher paid Senhouse $5,000 in cash on or about March 19 or 20, 1974 as the first half of the agreed bribe for the Astor Metals transaction referred to in the indictment.

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Hutcher's experienced trial counsel met the point head on. After pointing out the criminal records of Crisona, Ebbecke, Mydanick and Koch, and the motivation of Crisona and Ebbecke to lie in order to gain favor from the Government, counsel, in his opening to the jury said (Tr. p. 22):

> "Concerning the bribery aspects of it. You heard the name Kenneth Senhouse mentioned. Ken Senhouse was the loan officer in charge of that SBA application in Long Island. This alleged bribery, this passage of $5,000 that you heard in a restaurant, occurred according to Mr. Crisona back in March of 1974. You will find that *the same SBA officer, Kenneth Senhouse, is presently an employee of the Small Business Administration. He is presently in the same position he had back in 1973 and 1974.*
>
> Even though the government alleges that he is recipient of a bribe, you will find *he's never been indicted.* You will also find another course [*sic:* case] where Mr. Hutcher's indictment in this case is the [result of] faulty investigation of the government. That would be established to your satisfaction. I will have more to say about that in the later stages of my summation when I appear before you again.
>
> Basically that is where the bribery—there was no bribe paid whatsoever. One significant aspect you will find concerning the dates that were mentioned by Mr. Doyle, and that Mr. Senhouse completed his duties and gave approval to that SBA application in February of 1974, approximately February 26th of 1974. The alleged bribe, according to Mr. Crisona, occurred on March 20th or thereabouts, a month later, after Mr. Senhouse had performed all the necessary services here." (Emphasis added).

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The defense called Kenneth Senhouse as its first witness. He testified that he had been employed with the SBA as a loan officer for twelve years and was so engaged at the time of trial. He admitted that he knew Hutcher, but testified that he did not know Crisona. He denied he had ever had lunch with Crisona and Hutcher, and denied that Hutcher had paid him any money in connection with the Astor Metals loan or had ever given him an envelope with $5,000 in cash.

On *direct* examination he was also asked by defense counsel (Tr. p. 323):

> "Q. Now, Mr. Senhouse, during the period 1977-1978 up to the present date, have you ever been asked by anyone from the Federal Bureau of Investigation whether or not you received a bribe in this case?
>
> A. I don't recall, sir. I don't recall having anybody ask me that question."

The witness also testified that he had never been subpoenaed before a federal grand jury with respect either to Hutcher or Astor Metals, and was never asked by the Government whether he knew Crisona, or had ever received a bribe from anyone in this case. After it was brought out that Senhouse was "aware of his rights with respect to testifying in the case," and testified that he was aware that he "did not have to testify if he did not want to," the defense elicited that Senhouse had informed his superiors at the SBA during May 1979 that he was considered to be the person who received the bribe in this case, and was considered a co-conspirator by the Government. They had done nothing about it.

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The clear implication of this direct testimony was that the Government, or the prosecutor, was engaged in what may be most charitably described as the unequal administration of justice: a bribe taker being permitted to continue to hold a position of public trust while the bribe giver is brought to trial on three felony counts. It is against this background that the scope and nature of the cross-examination of Senhouse must be viewed. The issue tendered to the Government, that of unequal prosecution, is a very serious one, and something with which our jurors are rightfully concerned. While Hutcher did not attempt to mount a *Yick Wo* defense [*Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886)], he appeared to seek to raise reasonable doubt or obtain juror nullification by showing that the Government's witnesses were all crooks, which they were, who had strong motives to lie; that Hutcher was merely boasting on the tapes when he admitted bribery and implicated Senhouse; and that the same Government, often viewed by jurors as a monolithic single minded institution, rather than the Hydra-headed monster which it has become, was doing nothing about Senhouse while pursuing Hutcher. That this argument or tactic had a strong practical appeal to jurors follows from the Government's unsuccessful effort to obtain an order from the Court precluding the defense from pursuing the point. See colloquy, Tr. p. 94, *et seq.* It was appropriate, and essential, then, for the prosecutor to ask Senhouse whether he had been interviewed by the FBI in connection with "other allegations about the receipt of bribes." This Senhouse answered in the affirmative, and an objection was overruled. Thereafter, presumably as a

matter of tactics, no further objection was taken to the next question which was "How many times?" The answer to this question was helpful to the defense theory when Senhouse said "Maybe twice." In the ensuing interrogation, to which no objection was made, Senhouse said that he could not remember how many bribery allegations he had been asked about, that he had denied all the allegations when he was interviewed. He testified that he was never asked by the grand jury about Eddie Hutcher, but that he did testify in the grand jury about "other bribery allegations" in which he denied receiving money. Senhouse testified (Tr. p. 329) "They weren't specific allegations [of bribery]. All they [the grand jurors] said was that I have a big house and fancy car and things of that kind." He claimed that he did not recall having been asked whether he received money from "Mr. Hume of Manufacturers Hanover Trust Company." The witness' memory was refreshed as to whether he had been asked in the grand jury about dealings with other persons not related to this case, again without objection. The thrust of the testimony was to show that Senhouse always denied having received any money. Our jury had previously been instructed specifically that "questions are never evidence" and that only the answer constitutes evidence. Senhouse denied he had accepted a $1,500 bribe in connection with Ebbecke's own loan. This concluded the extent of the cross-examination now objected to.

Viewed in context, it was not error to have permitted such cross-examination, even had timely objection been taken. The Government was entitled to show the jurors that it was proceeding in good faith, and to rebut the im-

plication that Hutcher was the victim of some discrimination or inequality practiced by the prosecutors, of the sort which exempts the bureaucrat who takes, but punishes the businessman who gives.

Senhouse admitted that he knew Hutcher and that he had met him a dozen times since he first met him in connection with the Astor Metals loan (Tr. p. 345). The balance of Senhouse's cross-examination correctly related to bias and favor in that the Government showed that Hutcher had brought another borrower to Senhouse's attention (Accra-Fab) and that Senhouse had introduced Hutcher to "our procurement people" who had helped Astor Metals get a government paper clip contract.

On redirect examination, the defense pursued its original well-thought out strategy with respect to the claim of unequal and unfair treatment. Counsel elicited from Senhouse that he had not appeared before a grand jury since March of 1976, that he had always been available to answer all questions since that date, that he had not taken advantage of his privilege to refuse to incriminate himself, and that he recognized, then and at trial, that he could be indicted for perjury. Defense counsel also elicited that Senhouse had never been asked by anyone from the Government whether he knew Frank Crisona, and further, that he did not know Crisona. The Court's effort to have Crisona confronted by Senhouse (Tr. p. 353) was frustrated by the unavailability of Crisona on the day of Senhouse's testimony.

In his summation, defendant's attorney, after explaining in detail why Crisona's testimony should be regarded

as "a complete fabricatiion, it never happened" then argued to the jury as follows (Tr. pp. 561, *et seq.*):

> "Mr. Doyle tells you what motivation does he have to lie? His primary motivation would be to keep his mouth shut. 'I respectfully refuse to testify on the ground it would tend to incriminate me.' He doesn't even risk a perjury indictment. 'I don't want to testify, thank you for coming out to see me but I don't want to go into any courthouse, I want to sit out here in Long Island and do my work because if I do come in, I will take my Fifth Amendment privilege. I am sorry for Mr. Hutcher.' That is what he could have told me but he didn't tell me that. He told me he would come here and testify under oath and in testifying, what does he tell you? He tells you 'look, I helped Mr. Hutcher during the course of this thing, sure, that is my responsibility. I am a government agent, a small business loan person and if I can be helpful, that is what I am being paid for. I didn't take one dime from Mr. Hutcher. Never had a meeting at a diner with Mr. Crisona and Mr. Hutcher. I don't know Frank Crisona.' In fact, if you look back at Crisona's testimony, the only time Crisona could have ever met him was that one date March 20th but that never happened so he never met Senhouse. Senhouse is right. He has never met Frank Crisona, so Crisona fabricated the whole situation again, he saved himself years of jail time.
>
> You have to recognize that in saying that, Mr. Senhouse could easily say 'I know Frank Crisona but I never took a bribe.' That could protect him from a possible perjury indictment.
>
> Perhaps Crisona had a friend [who] saw him with Crisona. They could indict him [Senhouse] for perjury.

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So he comes here and testifies truthfully and he tells you no bribe, doesn't know Frank Crisona, a total fabrication. I read what Crisona said about Senhouse. It is totally untrue, he never had a meeting with Senhouse, Senhouse doesn't even know him and Crisona tells you he never had a meeting with Crisona without Hutcher being present.

* * *

No question in my mind if the FBI agents went to see Mr. Senhouse, assuming he took the bribe, he would say he didn't take the bribe, but if he in fact met Frank Crisona in a diner, he would tell you he met him. There is nothing criminal about that. He met Crisona in the diner because he might have been worried about a surveillance by the FBI, he would have answered their questions with regard to the innocent matters. They didn't even bother to go see Mr. Senhouse to get a story.

The last time they talked to him was March 6th in the grand jury. Crisona tells him about Hutcher in 1977 and I guess they are required to pursue the guilty but how about the innocent, don't you also have the responsibility to the innocent? Don't you have the responsibility to go out as FBI agents, arms of the government, and say 'Mr. Senhouse, did you get a bribe, do you know Crisona [says he was] with you at the diner?' Do something with regard to the investigation?

I submitted the FBI interviewed Mr. Senhouse and do not forget, Mr. Senhouse testified before the March 5, 1976 grand jury. He is responsive to questions. He will tell you and if they would have found out that he totally denies knowing Frank Crisona, I think the government would have taken another look at this case

and said 'wait a second, we have a bad man here with Crisona, and we have a man [Senhouse] who is not being shifty with us' saying 'I know Crisona but I didn't take a bribe,' but instead he said he never met him and the government didn't look at the case. They indicted him [Hutcher] without the proper investigation. They indicted Mr. Hutcher without giving him the benefit of Mr. Senhouse going before the grand jury that indicted him, so Mr. Senhouse could have testified before that grand jury.

The grand jury might have looked at it differently which I suspect is the way you will be able to look at it now with the full evidence before you and they would not have indicted him.

One thing is sure, while the government didn't give Mr. Hutcher his due back in 1977, '78 and '79 with a proper investigation, at least now he can rely upon you who know all the facts to protect his innocence and come back with a verdict that is justified in this case."

The prosecutor's initial summation had raised no innuendo concerning past criminal acts of Senhouse. After conceding (Tr. p. 515) that Crisona and Ebbecke had a bias or motive to testify for and cooperate with the Government, he argued that Hutcher and Senhouse also had an interest in the outcome of the trial. No reference to the cross-examination of Senhouse, or the fact that Senhouse had been suspected of taking bribes from others was made, nor did the prosecutor discuss the *Yick Wo* contentions. He did comment on the fact that Hutcher's own testimony concerning Senhouse's activities in procuring the life insurance for the Astor Metals loan through Culuso conflicted with

Senhouse's own testimony, and that Senhouse also denied a conversation to which Ford, a disinterested witness, had previously testified.

In rebuttal summation the prosecutor responded (Tr. pp. 569-70):

> "With respect to Mr. Senhouse, I think it probably is a valid point as an investigative technique it may have been preferable to [have] interview[ed] Mr. Senhouse after this information [the tape of Hutcher and Crisona] was made available to the government, but what does that have to do with the guilt or innocence of Eddie Hutcher? What difference would it have made to the FBI or the grand jury if Mr. Senhouse had gone in and given another set of denials?
>
> [Defense counsel's] point is, it would have been more difficult for [Senhouse] to say that he knew or didn't know Crisona. If he said he didn't know Crisona, maybe he was risking perjury. Again, what does that have to do with the guilt or innocence of Mr. Hutcher? The fact is that Mr. Senhouse, you have heard him testify, you can size him up as a witness, would you make an important decision in your life on any issue whatsoever based on the testimony of that individual as you saw him from the witness stand? Would you let a denial from Mr. Senhouse deflect your investigation from its true course of action when that investigation led to a detailed admission by this defendant to someone in an unpressured situation [*i.e.*, the tape] as to exactly what happened? And finally, even if [defense counsel] is completely right about Mr. Crisona and you throw out Mr. Crisona and don't consider his testimony, I submit there is more than enough evidence to convict Mr. Hutcher based on the testimony of Mr. Ebbecke. . . ."

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This was not a case of attempting improperly to use prior acts of misconduct during cross-examination. To the extent founded on claimed error in connection with the cross-examination of Senhouse, plaintiff's motion is denied.

Greenspun's Testimony—Claimed Perjury and "Brady" Violation

As a separate ground, defendant contends the Government witness Greenspun perjured himself at trial, and that the Government failed to comply with its duty to turn over with respect to that witness, *Brady* material, and statements required to be produced in accordance with 18 U.S.C. § 3500, *et seq.*

One of the issues at trial was whether in connection with the SBA loan the co-conspirators, including Hutcher, had submitted a false and excessive figure for the fixed assets, that is, machinery, equipment and inventory of Astor Metals. The finanicial statements listed the fixed assets as at September 30, 1973 at $150,772, less depreciation accrued at $1,875, leading to a net figure of $148,897 after deduction for depreciation. See Government Exhibit 1G, p. 2, which bears the signature of "Eddie Hutcher, Sec."

When value for an asset is stated as being net of depreciation, what is being referred to is book or historical cost, net of booked or historical depreciation accruals which had actually been made, or which should have been made. This nomenclature is well known to accountants and to most businessmen who deal with financial statements. Crisona testified at the trial that the figures used on the SBA application had been fabricated and "inflated very sub-

stantially'' by co-conspirator Pepper, the accountant for Astor Metals, who died prior to the trial (Tr. p. 35). This evidence was admissible on the conspiracy count.

Eugene Greenspun testified for the Government, beginning at Tr. p. 238. He showed that he was, at the time of trial, the Chief Engineer in charge of production for a pharmaceutical laboratory in New Jersey, and that his employment history had generally been in the manufacturing, or production engineering field. Hired by Hutcher, he did not join Astor Metals until about October 1974. He operated the Astor plant until about the middle of 1976.

Greenspun described the machines located in the two plants of Astor Metals, and Probe, its subsidiary. He estimated the age of the equipment at 25 to 30 years old, and disclaimed any ability to estimate its future life expectancy. He estimated the *market* value in place, at the time that he first saw the equipment at ''about $35,000, in that area,'' together with about $25,000 at the plant of Probe.

He added ''a couple of thousand dollars'' for inventory which he regarded as having only a scrap metal value, and saleable manufactured goods somewhere between Five and Ten Thousand Dollars.

On cross-examination, defendant was able to bring out the catalog of products which this plant, now claimed to be so antiquated, was capable of making. Defendant introduced the replacement value appraisal of one Dobler, made for the management of Astor Metals, Exhibit Q in evidence which contradicted Greenspun in large part. Dobler's appraised value of ''equipping a similar plant''

(*i.e.*, a used plant) including electrical and physical installation costs amounted to $215,745 as of August 1, 1972.

Greenspun's testimony was offered for two purposes: to show that the borrower, controlled by Hutcher and Bartel did not spend any significant sums after the loan closing to modernize or expand the plant, as the application to the SBA had promised, and also to show that the financials were falsified in the matter of inventory and equipment. Familiarity with the Court's rulings and colloquy with counsel commencing on p. 259 of the trial record is assumed. Greenspun *admitted* (Tr. p. 274) that most, if not all, of the equipment appraised by Dobler in 1972 was physically present in 1974, but refused to alter his opinion about the market value.

Greenspun also testified at the post-verdict hearing. It turned out that Greenspun had become the owner of record of the stock of Astor Metals just prior to its subsequent bankruptcy. On October 7, 1975 Astor Metals filed Chapter XI proceeedings under the Bankruptcy Act. Proper venue for these bankruptcy proceedings was in the Eastern District of New York. The loan from the Vanguard Bank guaranteed by the SBA had closed on March 25, 1974. Greenspun testified that he discussed the necessity for Chapter XI filing with Hutcher, that Hutcher "assigned an attorney to me" and that the attorney thereafter filed the Chapter XI proceeding. Hutcher attended the first hearing in that proceeding. From time to time Greenspun went to the bankruptcy court, accompanied always by the bankruptcy attorney designated by Hutcher. Usually, before going to court, Greenspun would meet the attorney

in Hutcher's office, and would go together with the attorney to bankruptcy court.

Greenspun testified in the bankruptcy court and signed most of the sworn representations made by the Debtor to that court. Greenspun admitted at the post-verdict hearing here that the initial figures he presented to the bankruptcy court, showing $142,000 for net machinery and equipment, were taken from an accounting statement; and testifies now that he "didn't even take notice of it" and that the statement obviously was presenting book or historical cost rather than market cost. On February 3, 1976, he testified before the bankruptcy court as follows:

> "Q. Did you prepare a balance sheet of that corporation?
>
> A. *I did.*
>
> Q. Can you detail to the Court the assets and liabilities of the corporation?
>
> A. . . . Fixed Assets: the equipment, leasehold and tools, $227,863. Less accumulated depreciation: $85,743 even. Total fixed assets: $142,120.
>
> Q. Mr. Greenspun, would you say that the market value of the fixed assets are greater or less than the book value of the assets?
>
> A. *I would say the market value gave me a gain.*" [Emphasis added].

The underlined portion of the above testimony is arguably false, either wilfully so or recklessly made. It is inconsistent with Greenspun's trial testimony. Clearly it was Pepper, not Greenspun who prepared the financial records. Greenspun, an engineer, lacks the knowledge and professional skill to prepare such financial statements. To

the extent the intentionally ambiguous second underlined answer was intended to convey the thought that the market value was greater than the net book value in 1976, it was false and probably perjurious. The subsequent judicial sale confirms this. Probably it is inconsistent with Greenspun's trial testimony as to 1974 market value. Possession of the transcript would have been useful for cross-examination of Greenspun at this trial, as would other representations stated below made by him to the bankruptcy court for the fixed assets:

October 3, 1975 — $200,000.00

October 9, 1975 — $195,000.00

November 6, 1975 — $195,000.00

January 13, 1976 — "almost impossible to estimate"

I decline to find that Greenspun prejured himself at the trial before me, when he described the fixed assets he found at Astor in 1974, or gave his opinion as to their market or replacement value (as used machinery). I also decline to find that the Government by calling Greenspun, knowingly used perjured testimony. Mr. Doyle, who prosecuted this case, testified, and I find, that prior to the verdict, although he knew that Greenspun had testified in the bankruptcy court, he did not know the contents or subject matter of his testimony. This information did not come to his attention until after the verdict, when defendant called his attention to the matter. I find that neither he nor any member of the United States Attorney's Office at any time prior to verdict had actual knowledge of the contents of the bankruptcy court testimony of Greenspun.

Appendix B—Memorandum of the District Court Denying Motion for a New Trial

We now turn to the claimed *Brady* violation, and consider what was known to the prosecutor's office, when it was learned, and also, what was known to defendant and his counsel.

Hutcher is an experienced businessman who has at least some familiarity with proceedings in the bankruptcy court, as appears from his comments made to Crisona on the pre-indictment tape. At the post-verdict hearing it developed that financial statements for Astor Metals were filed with the bankruptcy court. Apparently these used similar per books figures to those prepared by Pepper for the SBA.

Surely it was no surprise to Hutcher that any Chapter XI proceeding usually includes financial statements for the Debtor. Anyone who reads the newspapers knows that petitions in bankruptcy court are almost invariably accompanied or followed closely by financial statements listing assets and liabilities, usually stated as per books (historical cost less depreciation accrued). Indeed, such information concerning a Debtor's property is required to be submitted, pursuant to 11 U.S.C. § 724.

Hutcher was personally present on one occasion before the bankruptcy judge, and he was deposed in the proceeding by attorneys for Vanguard Bank. In addition to designating the lawyer for the Debtor-in-Possession, he had "sold" the stock to Greenspun and was listed in the petition as an unsecured general creditor in the amount of $70,000.

We begin our *Brady* analysis, therefore, with the premise that Hutcher knew, prior to trial, that Astor Metals had gone bankrupt. Hutcher knew that the principal officer during the bankruptcy for Astor was Greenspun, and he

knew that Greenspun and Astor had been represented by the attorney designated by Hutcher. He knew or should have known that financial statements and operating statements are filed regularly in bankruptcy court by Chapter XI Debtors-in-Possession, and also with respect to adjudicated bankruptcy.

Both Greenspun and Lampert testified in the post-trial hearing that Hutcher was present at the first meeting of creditors in the bankruptcy court November 6, 1975. Hutcher filed his proof of claim at that time and another creditor, Mr. Ruggeri, President of Accra-Fab, Inc., nominated Hutcher, first as a Trustee, and then as a member of the creditor's committee. Both nominations were rejected by the court. At that proceeding (Bkcy. Tr. pp. 25-26, 30-31), Greenspun testified about Hutcher and the financial statements of the company as follows (Exhibit F on this hearing):

"EXAMINATION BY THE COURT

Q. How long have you known [Mr. Hutcher]?
A. I have known him about four or five years.

Q. What relationship does Mr. Hutcher have with the prior management of Astor Metal?
A. I quite frankly don't know. I know that he had some say in the matter, there is no question about that, but it is the honest to God's truth I don't know what his position was. I do know that he was a person of authority.

Q. He had some position with the prior management?
A. Yes, but to what degree, I wouldn't know.

* * *

Q. Mr. Greenspun, I show you the petition in Chapter XI, schedules of assets and liabilities, and the statement of affairs, which you filed, and ask you whether these were signed by Mr. Jerraima [sic, should be Jarema], as president?

A. Yes, sir.

Q. Did he have authority to sign at that time?

A. He did.

Q. As president of the company?

A. He did.

Q. You are the sole stockholder of the company, is that correct?

A. Yes.

Q. Was [this] Chapter [XI] proceeding filed with your approval, and knowledge and consent?

A. Yes, sir.

Q. Are they true and correct in all respects?

A. To the best of my knowledge, yes.

Q. Do they list all of the assets and all of the liabilities of this debtor, Astor Metal?

A. To the best of my knowledge, yes."

Nothing in the record suggests that Hutcher, the largest single unsecured creditor, was not present for the entire meeting. Thus, he would have heard the above testimony about the schedules of assets and liabilities. Hutcher also knew that it was more likely than not that Greenspun would have testified more than once in the bankruptcy court concerning Astor's affairs.

During pre-trial preparation, in response to strong urging by this Court, the Government gave what is known

as "open file discovery." This local practice has developed in the aid of the administration of justice, and specifically as a response to the stringencies of the Speedy Trial Act. In effect, the Government makes available its *prima facie* case to defense counsel, and shows its document file, including grand jury testimony, Forms 302, and witness statements. The advantages of this procedure are obvious. It avoids necessity for useless pre-trial motions which consume paper, waste time and divert the attention of those concerned from important things to trivialities. It gives a defendant an opportunity, when possible, to convince the prosecutor that there is no case, or that he is innoment of any wrongdoing. It prevents surprise at trial, and aids the defendant in marshaling his evidence to present a cogent theory of defense at trial. The Government in its discretion grants this "open file discovery" wherever practical and where it can be done without risking the lives of witnesses, or impeding other cases which may still be under investigation.

During the month of April 1979 the trial attorney for defendant was shown every document that was in the file, and had photostats made of those which he regarded as useful. Early in June 1979 defense counsel came to the office of the United States Attorney and reviewed other and additional files. While defense counsel stated that he had never seen in those files the photostatic copy of the bankruptcy court docket sheet. I find that the copy was obtained by Investigator Nauwens of the United States Attorney's Office on May 22, 1979 and placed in the file that day. Of course, the bankruptcy court docket sheet

showed that Greenspun had testified in that proceeding. Even without seeing this docket sheet, it was known to Hutcher and readily apparent that Greenspun must have testified. Defendant and his attorney learned on June 19th that Greenspun was going to be a witness for the Government. [He testified on the following day.] In addition, prior to trial, counsel for the defendant had inspected the Vanguard Bank file, which placed him on direct notice that there had been a bankruptcy proceeding, gave the venue and name of the judge, and showed that Greenspun had been a participant in the bankruptcy hearings. Defendant introduced at trial Exhibit N, a record of Vanguard Bank which shows that Greenspun was acting in July 1976 for the Debtor-in-Possession and answering financial inquiries with respect to its affairs.

Mr. Doyle testified, and I find, that "all documents that were obtained from third parties in connection with the investigation" were shown to and inspected by defendant's counsel prior to trial. This includes the docket sheet entries in the bankruptcy court, and while I credit defense counsel's testimony that he does not recall seeing them, I nonetheless find that they were made available for his inspection prior to trial as part of the "open file discovery."

As may be seen from the foregoing, and from the discussion below, defendant and his attorney had as much or more notice of the possible existence of impeachment material concerning Greenspun in the bankruptcy file as did the Government.

We now turn to what the Government did in preparation for trial. Initially, Mr. Doyle had asked FBI Special Agent

Appendix B—Memorandum of the District Court Denying Motion for a New Trial

Mershon (a non-lawyer with an accounting background), to make an effort to locate Greenspun, and Mershon visited the Eastern District bankruptcy court to look in the files to see if he could find where Greenspun was located. Mr. James Nauwens, an "Investigator" for the United States Attorney's Office, also a non-lawyer, was sent on May 22, 1979, less than a month prior to trial, to look in the bankruptcy files for possible testimony of *Hutcher,* of which there was none found, and for any information which might assist in locating the books and records of Astor Metals. Mr. Nauwens reported back that there was no sworn testimony of Hutcher in the files. As noted, he brought back a photostatic copy of the docket entries together with the list of creditors, and names and addresses of persons he considered likely to know the location of the corporate books and records.

This examination was cursory, and performed under time constraints. In fact, *Hutcher had* testified under oath in the Astor Metals bankruptcy on January 21, 1977 by deposition, as a careful examination of the file would have shown.[2] No transcript of that deposition was filed, but a careful file review by a lawyer would have led to it. On May 25, 1979, Special Agent Mershon went through the bankruptcy court files again at the request of Mr. Doyle. He was looking for admissible evidence against Hutcher, correspondence or testimony. Mershon reported nothing found.

---

2. Hutcher also testified as to his status as a creditor at the November 6, 1975 bankruptcy proceeding. See *supra,* p. 18 [33a].

Appendix B—Memorandum of the District Court Denying Motion for a New Trial

In connection with this trial, on June 6, 1979, Greenspun received a grand jury subpoena, which he satisfied by interviewing with prosecutor Doyle in Doyle's office on the next day. The trial began June 18, 1979. Greenspun gave Mr. Doyle information substantially similar to that which was testified to at the trial. Greenspun told Doyle that he had appeared in bankruptcy court on a frequent basis, and had sent weekly reports as to cash flow, expenditures and sales, and that he used an attorney designated by Hutcher. He told Doyle that a personal tax claim had been asserted against him, by reason of the failure of Astor Metals to pay withholding tax. Although Greenspun told Doyle about his problems, he testified, and I find, that he reached no agreement with respect to his testimony with the Government, that the Assistant United States Attorney made no promises to him, and that he understood, and in fact told Doyle, that with respect to his personal tax deficiencies "I knew that he couldn't, through his office, do me any good whatsoever, and I knew that the government agency did not interlock, but just made the statement [to Doyle] that I was the one responsible for the tax money." (Post-Verdict Tr. p. 168). Three or four weeks after verdict Mr. Doyle did write a letter to the Internal Revenue Service in Greenspun's behalf, but I find that this was not part of any prior arrangement, and that there was no violation of the *Brady* rule or § 3500 by failing to disclose any such agreement, as no agreement existed during the trial. Hutcher had actual knowledge prior to trial that the Internal Revenue Service was pursuing Greenspun for Astor's unpaid withholding taxes.

Appendix B—Memorandum of the District Court Denying Motion for a New Trial

I also find that neither Doyle nor any Assistant United States Attorney in this District had actual knowledge at the time of trial that Greenspun had testified in bankruptcy court inconsistently with his trial testimony or had lied in that forum. That they should have realized such testimony probably existed and was probably inconsistent is an argument which applies equally to defendant and his counsel.

It is of no help to defendant to argue that the Government should have been aware of the contents of Greenspun's testimony prior to trial, or should have anticipated in all practical likelihood that the Astor bankruptcy proceedings probably contained such testimony by Greenspun, and that probably, like most Debtors-in-Possession operating under the Bankruptcy Act, Greenspun had exaggerated the financial prospects of Astor Metals, and had probably testified about the value of its inventory, machinery and equipment at that time. Hindsight, that "wisdom developed after an event and having it and its consequences as a source is a standard no man should be judged by." *Costello* v. *Costello,* 209 N.Y. 252, 262 (1913). Perhaps the prosecutor should have known. Assuming, without finding, that he should have known, I am satisfied that he did not know. If hindsight permits us to say that any practical lawyer should have known, such use of hindsight is unfair. It is applicable likewise to defendant and his attorney.

The prosecutor had an examination made of the files of the bankruptcy court solely for a limited purpose. Those who were sent were not lawyers; they completed the errands on which they were sent, but did not bring back with them Greenspun's conflicting testimony. Indeed, FBI Agent Mershon, the most skilled of the two, reported to Mr. Doyle

that he had found nothing of interest in the file, and made no copies of any documents in the bankruptcy court file other than the docket sheet.

It is the thrust of the defendant's contentions here that although the prosecutor did not have the contents of the Brooklyn bankruptcy file in his possession physically, he had "constructive" possession of it as a matter of law. This is an absurd argument, and if carried to its logical conclusion would place the prosecutor in constructive possession of every piece of paper on file as a public record in any government office as possible *Brady* material. In short, what happened is that two investigators, at different times, looked at the files for specific limited purposes, *i.e.*, to locate Greenspun's address, find the corporate books and see if there was any testimony or other material which would be admissible against Hutcher. They reported back the results of their investigation, together with a copy of the docket sheet, which was made available in pre-trial discovery.

To argue from this that the Government has legal possession of the Greenspun testimony docketed and filed in bankruptcy court (not part of the Department of Justice or Executive Branch) is simply absurd.

We decline to extend the *Brady* rule to such an equally accessible public record as is present in this case. No authority has been cited which requires such extension.

Although we find no *Brady* or § 3500 violation in this case, in order to complete our analysis, it seems appropriate to consider the effect, if any, of a contrary conclusion.

In the Government's initial summation, little emphasis was placed on Greenspun's testimony; as noted, the record

already contained direct testimony by Crisona that co-conspirator Pepper, since deceased, had "puffed up" the figures. Of this, the jury was reminded. (Tr. p. 492). Later, the prosecutor argued that Greenspun's testimony showed no modern equipment had been added to the plant after the loan closed (Tr. pp. 512 and 530), a point not refuted, since most of the loan proceeds went to pay prior Meadowlands Bank loans, a fact admitted by Hutcher. The prosecutor argued, unconvincingly, that Greenspun's opinion was entitled to more weight than that of Dobler (Tr. p. 513).

In his rebuttal summation (Tr. p. 571), the prosecutor "backed off" from the issue of false financials to some degree, and shifted his emphasis to the concededly false statement as to use of loan proceeds. Defendant had admitted that he intended from the beginning to repay the Meadowlands Bank loan out of the proceeds of the SBA loan. Omission of this fact from the SBA application thereby rendered it false, wholly without regard to the alleged falsity of the equipment and inventory figures.

Greenspun's testimony was confusing at best, impeached by Exhibit Q, and but a small part of the Government's overwhelming proof of guilt against Hutcher. Hutcher had ample basis to cross-examine Greenspun, including actual and constructive knowledge, superior to that of the prosecutors, concerning Greenspun's prior imposition on the bankruptcy court, his tax difficulties (discussed with Hutcher by Greenspun prior to trial) and any possible animus or bias. Any further cross-examination would have been merely cumulative. During the trial, the Court observed (jury not present) at pp. 266-67:

> "I think you [Prosecutor] are making a lot of fuss over these financials when there is so much more involved.

Here you have a man who says on tape that he bribed this fellow, not once but three times and you want to horse around with your adversary over accounting statements which were prepared by Pepper and Crisona.

Mr. Doyle: There is a defense in the case.

The Court: I am waiting to hear it. Maybe we will get to it.

Mr. Doyle: In his opening statement [defense counsel] indicated that the admissions shouldn't be taken at face value for some reason, so I think this proof does go to the whole question of criminal intent and wilfullness here.

The Court: I am not precluding you from attempting to prove it. I just don't think it shows what you think it shows.

* * *

Mr. Doyle: . . . I think he [Greenspan] can say he either agrees or disagrees with these valuations [of Dobler, on Deft. Exhibit Q] and that would be a jury question.

The Court: The physical presence of the equipment would certainly be permissible to ascertain, and the fact no new equipment is added would be a relevant issue with respect to the use of proceeds part of the application to the SBA."

On the totality of this trial record, further cumulative impeachment of Greenspun, either on the grounds of bias or animus against Hutcher over the withholding taxes, or arising out of perjury in the bankruptcy court when he testified the market value of the Astor fixed assets, in his opinion, exceeded net book value, or both, could not have altered the result at trial, and could not have raised a reasonable doubt of guilt on any count. Indeed, had Greenspun never

been called, or if his entire testimony had been stricken out, the result would have been the same. Viewed most favorably, his testimony was cumulative, and of slight relevance. No paper submitted to SBA represented the "market" value of the equipment; all that was said or implied was that the accounting records of Astor showed certain figures (Gov't. Exhibit 1-G) and that the statements and supporting schedules submitted were "true and accurate," so certified over the signature of unindicted co-conspirator James Bartel (see Gov't Exhibit 1-G, p. 1), and also signed on page 2 by Hutcher. The tremendous disparity between these submitted figures per books on the one hand, and Greenspun's opinion of market value, borne out by the subsequent auction sale, on the other hand, may be some evidence that the schedules were so unrelated to reality as to be neither "true" nor "accurate." But the 1974 market value when Greenspun first arrived at Astor is hardly controlling or even significant.

Accordingly, within any of the standards of *United States* v. *Agurs,* 427 U.S. 97 (1976) or *Ostrer* v. *United States,* 577 F.2d 782 (2d Cir. 1978) as the outcome is not likely to have been affected, and no reasonable doubt is created, defendant is not entitled to a new trial, even assuming there was a *Brady* violation.

The motions are denied in all respects. The foregoing constitutes the Court's findings and conclusions.

So ordered.

Dated: New York, New York
October 25, 1979

/s/ CHARLES L. BRIEANT

Charles L. Brieant
U.S.D.J.

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of May one thousand nine hundred and eighty.

Present: HON. J. EDWARD LUMBARD
HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES

Circuit Judges,

79-1277,
79-1426

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDDIE HUTCHER,
STEPHEN, MYDANICK,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix C—Judgment of the Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of the court.

A. DANIEL FUSARO,
Clerk

/s/ EDWARD J. GUARDARO,

by: Edward J. Guardaro,
Deputy Clerk

FILED
May 5 1980
A. DANIEL FUSARO, Clerk

APPENDIX D

Orders of the Court of Appeals Denying Rehearing & Rehearing *en banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of June, one thousand nine hundred and eighty.

Present: HONORABLE J. EDWARD LUMBARD
HONORABLE WILLIAM H. MULLIGAN
HONORABLE JAMES L. OAKES
Circuit Judges.

79-1277

UNITED STATES OF AMERICA,
Appellee,

v.

EDDIE HUTCHER,
Appellant.

A petition for a rehearing having been filed herein by counsel for the Appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

FILED
Jun 18 1980
A. DANIEL FUSARO, Clerk

Appendix D—Orders of the Court of Appeals Denying Rehearing & Rehearing en banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of June, one thousand nine hundred and eighty.

79-1277

UNITED STATES OF AMERICA,

Appellee,

v.

EDDIE HUTCHER,

Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN

Chief Judge
IRVING R. KAUFMAN

FILED
Jun 18 1980
A. DANIEL FUSARO, Clerk

APPENDIX E

Constitutional Provisions, Statutes & Rules Involved

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, execpt in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 United States Code Section 3500

§ 3500. Demands for production of statements and reports of witnesses

* * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * *

(e) The term "statement", used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneouly with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Federal Rules of Evidence

Rule 103—Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

APPENDIX F

Extracts from Minutes of Trial

* * *

(327) *Cross-Examination* [of Kenneth Senhouse]

By Mr. Doyle [the Assistant United States Attorney]:

Q. Mr. Senhouse, you were asked by Mr. Hollman whether you had ever been interviewed by the FBI in connection with this case.

Is that what you were asked, sir?

A. Yes, sir.

Q. And you said you had not been?

A. Yes, sir.

Q. Have you been interviewed by the FBI in connection with other allegations about the receipt of bribes?

A. Yes, sir.

Mr. Hollman [defense cousel]: I will object to that.

The Court: Overruled.

A. Yes, sir.

Q. About how many times have you been interviewed by the FBI concerning other bribery allegations?

A. Maybe twice.

Q. And about how many bribery allegations did they ask you about?

A. I don't remember.

Q. Quite a few, weren't there?

The Court: That is a silly question.

Q. Well, was it more than three?

(328) A. I don't remember.

Q. Would you say between three and five?

A. I don't memember, sir.

Q. Isn't it a fact that you denied those allegations when you were interviewed by the FBI?

A. Yes, sir.

Q. Now you testified that you had not been examined in the grand jury with respect to Eddie Hutcher; is that correct?

A. To the best of my recollection, no, sir.

Q. The fact is—

> The Court: Wait a minute. I don't understand his answer. He says, "No."
>
> The Witness: Yes, I don't recall being questioned at the grand jury—asked about.

Q. However, you did testify in the grand jury about other bribery allegations, did you not, sir?

A. Yes, sir.

Q. And you denied receiving money in connection with those other allegations as well?

A. Yes, sir.

Q. And did that involve three or more bribery allegations?

A. I don't remember, sir.

(329) Q. Approximately, three or more?

A. No, sir. They weren't specific allegations. All they said was that I have a big house and fancy car and things of that kind.

Q. Well in the grand jury you were asked about—for instance, were you not asked in the grand jury whether you

had received money from Mr. Hume of Manufacturers Hanover Trust Company?

A. I don't recall that, sir.

The Court: Please stand between the witness and the jurors.

Mr. Doyle: Yes, I was going to move back.

May I have one moment, your Honor?

The Court: Yes.

(Mr. Doyle examines.)

Mr. Doyle: Your Honor, may I have one moment while Mr. Richards here looks for an exhibit for me?

The Court: Yes.

Mr. Doyle: Thank you.

(Mr. Doyle confers off the record.)

By Mr. Doyle:

Q. Mr. Senhouse, do you recall testifying in the grand jury on March 5th, 1976?

A. Yes, sir.

(330) Q. Do you remember this question and this answer—this is Page 11:

"Q. Have you ever received any compensation for processing the SBA loans other than the compensation received from the U. S. Government?

"A. Definitely not, sir."

Do you remember that question and answer?

A. Yes, sir.

Q. Were you asked about dealings with a Mr. Jack Kramer? Do you recall that, sir?

A. Yes.

Q. And were you asked about your dealings with a Mr. Stigh?

A. Yes, sir.

Q. Were you asked about a Mr. Richard Smith?

A. Yes.

Q. Were you asked whether you ever accepted money from Mr. Smith?

A. I don't remember whether I was asked, but the answer is no.

Q. Let me show you Page 17, these lines (indicating), and ask you if that refreshes your recollection.

A. (After examining) No.

(331) Q. It does not refresh your recollection.

A. I just answered it.

Q. Does this refresh your recollection that you were asked about accepting money from Mr. Smith, and you denied accepting money from Mr. Smith?

A. Yes, sir.

Q. It does refresh your recollection.

A. I don't understand.

Q. That you were asked that question and you gave that answer.

A. That's right.

Q. Were you asked about dealings with a Mr. Nunoz?

A. don't remember.

Q. I show you Page 20 of your grand jury testimony and ask you if that refreshes your recollection as to whether you were asked about Mr. Nunoz (handing).

A. (After examining) Yes, sir.

Q. And were you asked whether you and Mr. Nunoz and any other persons in the business community in that area ever asked for, arranged or received money?

Do you remember that question, sir?

A. I cannot remember something that happened so many years ago, if I was asked the question.

Q. Do you remember being asked anything about (332) receiving money?

A. Yes, sir.

Q. Does this refresh your recollection—again on Page 20, that you denied receiving money in connection with Mr. Nunoz (indicating)?

A. Yes, sir.

Q. Were you asked whether you received $1000 in an envelope from Mr. Smith?

A. If I was asked the question, the answer was "No." I never received an envelope from Mr. Smith.

Q. I am going to show Page 22 and ask you if that refreshes your recollection and whether you were asked that question (handing).

A. (After examining) Yes, I was asked that question.

Q. Were you asked whether you had ever received money from Mr. Bostick?

A. Yes.

Q. And did you deny that you had received money from Mr. Bostick?

A. Yes, I did.

Q. And were you asked whether you had received any money at all other than your Government salary because of SBA loan applications being filed and processed or (333) granted, and did you answer, "Yes, sir, I haven't."

Do you remember that question and that answer?

A. Yes, sir, I do.

• • •